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KOH BENG TECK & ORS

v.

IOI PROPERTIES BHD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
JOHN LOUIS O'HARA J
[SUIT NO: 22NCVC-441-04-2012]
4 JULY 2012

C ***CIVIL PROCEDURE:*** *Injunction - Order of injunction - Application for - Intrusion over plaintiffs' property by defendants to build public road without plaintiffs' consent - Whether prima facie a clear exemplification of trespass - Whether damages an adequate remedy - Whether third defendant empowered or authorised to enter plaintiffs' property - Whether* D *there was any statutory provision to justify third defendant's actions - Whether interim injunction granted*

LOCAL GOVERNMENT: *Maintenance and repair - Rectification of development - Construction works carried out on plaintiffs' property without consent - Whether prima facie a clear exemplification of trespass* E *- Whether third defendant empowered or authorised to enter plaintiffs' property - Whether there was any statutory provision to justify third defendant's actions - Street, Drainage and Building Act 1974, s. 83 - Local Government Act 1976, ss. 97, 101(v)*

F The first and second plaintiffs were the owners of a bungalow situated at No. 1 Jalan Puteri 9/2A Bandar Baru Puchong ("the property"). The first defendant was a property development company and along with the second defendant (a wholly owned subsidiary of the first defendant), developed and marketed a G project ('Puteri 9'). The third defendant was the local authority having jurisdiction over Puteri 9 and the property. By a sale and purchase agreement, the first and second plaintiffs purchased the property from the second defendant. The property was part of a housing development known as Elyssa Villas ("Elyssa Villas") which H was part of larger Puteri 9. Elyssa Villas and the property were built and completed in 2008. In 2009, certain portions of the access road to Elyssa Villas, that is Jalan Puteri 9/2, fractured. In May 2011, a landslide occurred at Jalan Puteri 9/2 causing severe damage to Jalan Puteri 9/2 and the retaining wall. In February I 2012, the soil condition of Jalan Puteri 9/2, the property and the

entire land of Elyssa Villas deteriorated. On 2 April 2012, the plaintiffs received a letter and a notice from the third defendant ('the notices'). The said notices declared the property as dangerous and at a near-collapse state. The third defendant, through the notice, instructed the first and second plaintiff to vacate the property. On 6 April 2012, the outer wall of the plaintiffs' property was demolished and a public road was built on the plaintiffs' property without the plaintiffs' consent. As such, the plaintiffs claimed, *inter alia*, an injunction to restrain the defendants from carrying out construction works whatsoever on the plaintiffs' land and from removing any part of the plaintiffs' land. The third defendant, however, argued that in exercise of its statutory duties and functions, it had issued a notice pursuant to s. 83 of the Street, Drainage and Building Act 1974 ('the Act'). The third defendant also relied on ss. 97 and 101(v) of the Local Government Act 1976 to further justify its authority for the acts taken in regard to the plaintiffs' property.

Held (granting interim injunction):

(1) The demolition of the outer walls of the plaintiffs' property and the subsequent intrusion over the plaintiffs' property by the defendants to build a public road without the plaintiffs' consent was *prima facie* a clear exemplification of trespass. Trespass does not depend on the balancing of rights but on the right of a property owner to exclude trespassers (*Anchor Brewhouse Developments Ltd and Ors v. Berkely House (Docklands Development)*; refd). A landowner is entitled to an injunction to restrain trespass onto his land whether or not the trespass harms him (*Patel v. WH Smith (Eziot) Ltd and Ors*; refd). (paras 21 & 22)

(2) If the interlocutory injunction were not allowed, the plaintiff would find an access road built upon his property which would cause severe nuisance to him. If the injunction were allowed, it would merely cause financial loss to the first and second defendant. As such, damages would not be an adequate remedy for the plaintiff but would be for the defendants (*Abdul Aziz Mohamed Ginan & Ors v. Datuk Bandar Kuala Lumpur*; refd.) (para 25)

(3) Upon a plain reading of s. 83 of the Act, the third defendant's construction of the said section that it was empowered to build a road over the plaintiffs' property was not accepted. No

power was given to the third defendant in regard to the construction of a temporary access road upon the plaintiffs' land. As for the provisions of s. 97 of the Local Government Act 1976, it does not give the local authority an unfettered and unchecked authorisation in all cases. Further, the power under s. 101(v) of the Local Government Act 1976 is to be exercised strictly in accordance with a positive law. It is not an enabling power by itself. This court had to ensure, that in exercising and executing its statutory duties to the public, the third defendant's actions were not only justified, but were also sanctioned by the very law it sought to rely on. The third defendant had not shown any statutory provision upon which it could ground its justification for the acts taken in regard to the plaintiffs' property. (paras 27-30 & 32)

(4) There were *bona fide* serious issues to be tried. The balance of convenience was also found to be firmly tilted in favour of the plaintiffs. Thus, this court ruled in favour of the plaintiffs and granted an interim injunction until the disposal of the hearing of the writ or further order of court. (para 33)

[Order accordingly.]

Case(s) referred to:

Abdul Aziz Mohamed Ginan & Ors v. Datuk Bandar Kuala Lumpur [2008] 1 CLJ 464 HC ***(refd)***

American Cynamid v. Ethicon Ltd [1973] 1 All ER 504 ***(refd)***

Anchor Brewhouse Developments Ltd and Ors v. Berkely House (Docklands Development) Ltd [1987] 3 BLR 82 ***(refd)***

John Trenberth v. National Westminister Bank Ltd [1980] 1 EGLR 102 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Liverpool Corporation v. Chorky Waterworks Co 2 De GM & G 852 ***(refd)***

Marriott v. East Grimstead Gas & Water Co [1909] 1 Ch 70 ***(refd)***

Muniandy Subramaniam & Ors v. Majlis Perbandaran Langkawi Bandaraya Pelancongan & Anor [2003] 4 CLJ 123 HC ***(refd)***

Patel v. WH Smith (Eziot) Ltd & Ors [1987] 2 All ER 570 ***(refd)***

R v. Somerset County Council, ex parte Fewings & Ors [1995] 1 All ER 513 ***(refd)***

Saw Seng Kee v. Director Of Lands & Mines, Penang & Ors; Teoh Han Che v. Director Of Lands & Mines, Penang & Ors [1986] 1 LNS 77 HC ***(refd)***

Smith & Ors v. Inner London Education Authority [1978] 1 All ER 411 ***(refd)***

Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1982] 1 LNS 83 HC ***(refd)***

Terra Damansara v. Nandex Development Sdn Bhd [2006] 8 CLJ 657 HC ***(refd)***

Legislation referred to:
Local Government Act 1976, ss. 97, 101(v)
Rules of the High Court 1980, O. 29
Street, Drainage and Building Act 1974, s. 83(1)

For the plaintiffs - Ang Hean Leng (Josephine Chin with him); M/s Lee Hishamuddin Allen & Gledhill
For the 3rd defendant - YM Raja Eileen Soraya (Joni Benedict with her); M/s Raja, Darryl & Loh

Reported by Suhainah Wahiduddin

JUDGMENT

John Louis O'Hara J:

Introduction

[1] This matter first came before me on 17 April 2012 as the hearing of the plaintiff's *ex parte* application (encl. 2) under O. 29 Rules of the High Court 1980 and the court's inherent jurisdiction:

> (2) that an injunction be granted to forthwith restrain the First Defendant and/or Second Defendant and/or Third Defendant, whether by themselves, their officers, servants, agents or any of them or otherwise howsoever, until the final disposal of this action or until such further order of this Honourable Court from:
>
> (a) entering, carrying out construction works and/or any works whatsoever on the Plaintiffs' land and/or Property held under No. 1, Jalan Puteri 9/2A, Bandar Puteri Puchong, 47100 Puchong (''Property''), removing any part of the Plaintiffs' land and/or Property.
>
> (b) further publishing or causing to be published statements that give rise to the defamatory meanings set out above or similar to the statements made in the letter of 3 April 2012 by the First Defendant and the Second Defendant concerning the Plaintiffs.

[2] For the purposes of the *ex parte* application, the plaintiff stated that he was prepared to abandon prayer 2(b) but would maintain his application for prayer 2(b) during the *inter partes* hearing.

[3] I allowed prayer 2(a) with costs in the cause and I fixed encl. 2 for *inter partes* hearing on 3 May 2012.

[4] The *inter partes* hearing of encl. 2 took place on 3-4 May 2012 and on 9 May 2012, I delivered my decision allowing:

(a) Enclosure 2 prayer 2(a) until the disposal of the hearing of the writ or until further order of the court;

(b) Enclosure 26 para. 8

[5] The Majlis Perbandaran Subang ("3rd defendant") now appeals against my decision. In delivering my decision in open court on 9 May 2012. I did say that proper grounds would follow if required. These then are my proper grounds.

The Factual Matrix

[6] The 1st and 2nd plaintiffs are the owners of a 2 1/2 storey bungalow situated at No. 1, Jalan Puteri 9/2A, Bandar Puteri Puchong, 47100 Puchong (''the property''). The 2nd plaintiff is the 1st plaintiff's wife. The 3rd plaintiff is the daughter and the 4th plaintiff is the son of the 1st and 2nd plaintiffs. The 5th plaintiff is the brother of the 2nd plaintiff.

[7] The 1st defendant is a property development company incorporated in Malaysia. The 2nd defendant is a wholly-owned subsidiary of the 1st defendant. The 1st defendant and the 2nd defendant developed and marketed, and continue to manage a project known as "Puteri 9".

[8] The 3rd defendant is the local authority having authority and jurisdiction over Puteri 9 and the property. It is not a department of the Government (see *Muniandy Subramaniam & Ors v. Majlis Perbandaran Langkawi Bandaraya Pelancongan & Anor* [2003] 4 CLJ 123).

[9] By a sale and purchase agreement dated 15 April 2006, the 1st and 2nd plaintiffs purchased the property from the 2nd defendant. The property was part of a housing development known as Elyssa Villas (''Elyssa Villas''), which is in turn part of larger Puteri 9. Elyssa Villas and the property were built and completed in 2008. Part of the construction involved earthworks including but not limited to new soil being added and filled onto the land, levelling of the ground, the construction of foundations and building of a retaining wall that is to hold back the soil.

[10] In 2009, certain portions of the access road to Elyssa Villas, that is Jalan Puteri 9/2, fractured. The property is situated next to Jalan Puteri 9/2, which is in turn next to a retaining wall and a slope. Jalan Puteri 9/2 is the only access road leading to Elyssa villas. In or around May 2011, a landslide occurred at Jalan Puteri 9/2 causing severe damage to Jalan Puteri 9/2 and the retaining wall.

[11] In or around February 2012, the soil condition of Jalan Puteri 9/2, the property and the entire land of Elyssa Villas deteriorated as the fractures became wider and deeper. The road sank, soil movement continued to be detected and more new fissures and fracture lines appeared. Soil and water movement continued towards the slope away from the housing.

[12] On 9 March 2012, the lst and 2nd defendants wrote to the residents of Elyssa Villas advising them to relocate temporarily to a hotel in Puchong at the cost of the 1st and 2nd defendants. It was announced, through a meeting between the representatives of the defendants, the police and the residents of Elyssa Villas, that access to Jalan Puteri 9/2 would be limited and cars would be prevented from using Jalan Puteri 9/2. As a result the cars of the residents and occupiers of Elyssa Villas, including those of the plaintiffs had to be parked outside Elyssa Villas. The residents and occupiers of Elyssa Villas including the plaintiffs had to walk to reach their houses in Elyssa Villas.

[13] The defendants intention was to demolish the gardens of the property along with those of three other properties namely No. 1 Jalan Puteri 9/2, No. 2 Jalan Puteri 9/2A and No. 2 Jalan Puteri 9/1B, to construct a temporary road. The 1st and 2nd defendants

offered to purchase the property from the 1st and 2nd plaintiffs but only at what the 1st and 2nd plaintiffs considered a price lower than the market value price.

[14] On 2 April 2012, the plaintiffs received a letter dated 30 March 2012 and a notice dated 2 April 2012 from the 3rd defendant (''the notices''). The said notices declared the property as dangerous and at a near-collapse state (''dalam keadaan hampir runtuh, mungkin akan jatuh dan berbahaya'').

[15] The 3rd defendant, through the notice, instructed the 1st and 2nd plaintiff to vacate the property and further imposed conditions as follows:

(a) to demolish the fence, fish pond, pergola and other related works;

(b) to construct a path or temporary access road in the compound of the property in order to allow defects of such building structure, road and retaining wall ready to be repaired.

[16] On 6 April 2012, the outer wall of the plaintiffs' property, was demolished notwithstanding the plaintiffs' solicitors' letter of 3 April 2012 and 4 April 2012 and a public road was being built on the plaintiffs' property without the plaintiffs' consent.

[17] As such the plaintiffs in their encl. 1 claim:

(a) an injunction to restrain the 1st defendant and/or 2nd defendant and/or 3rd defendant, whether acting by themselves, officers, servants, agents or any of them or otherwise howsoever until the final disposal of this suit or until such other further order from this Honourable Court from entering, carrying out construction works and/or any works whatsoever on the plaintiffs' land and/or property, removing any part of the plaintiffs' land and/or property;

(b) an injunction to restrain the 1st defendant and/or 2nd defendant, whether acting by themselves, officers, servants, agents or any of them or otherwise howsoever until the final disposal of this suit or until such order further order from this Honourable Court from further publishing or causing to be published statements that give rise to the defamatory meanings

set out above or similar to the statements made in the letter of 3 April 2012 by the lst and 2nd defendants concerning the plaintiffs;

(c) Damages pursuant to para. 34 above;

(d) Interest thereon at the rate of 4% per annum from the date of filing of this writ until the date of full settlement;

(e) Aggravated and exemplary damages;

(f) Costs on a solicitor client basis.

The Basic Law

[18] The law in regard to the granting of an interim injunction is to my mind settled to the point of being trite. We have *American Cynamid v. Ethicon Ltd* [1973] 1 All ER 504 and *Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors* [1995] 1 CLJ 293.

As I see it I have to decide:

(a) whether there is a *bona fide* serious issue to be tried;

(b) if the answer is in the affirmative, I have then to consider of damages are in adequate remedy;

(c) it is where there is doubt as to the adequacy of damages available to either party or to both that the question of balance of convenience or justice, as it is also called, arises. In making my assessment I am mindful that I have to take into account all relevant matters, including the practical realities of the case and that they vary from case to case;

(d) I am to also have in mind that the remedy that I am asked to administer is discretionary, intended to produce a just result for the period between the date of the application and trial proper and intended to maintain the *status quo*.

Consideration And Finding

[19] In regard to (a) above my task at this stage is just to determine on a *prima facie* basis if there exists a *bona fide* serious issue to be tried. The serious issue to be tried will invariably in most cases be the cause of action stated in the statement of

A claim, I am not required to decide that serious issue at this stage; (all I have to do and here I am repeating myself lest I forget) at this stage is to determine that *prima facie* a *bona fide* serious issue does exist.

B **[20]** Now there is no doubt in my mind that there is a *bona fide* serious issue to be tried, that is whether the giving of notice and the subsequent trepass upon the plaintiff's property for the purpose of building the access road, is according to and authorised by law. See *Abdul Aziz Mohamed Ginan & Ors v. Datuk Bandar* C *Kuala Lumpur* [2008] 1 CLJ 464 @ 479 para 39.

[21] The demolition of the outer walls of the plaintiff's property and the subsequent intrusion over the plaintiff's property by the defendants to build a public road without the plaintiff's consent is to my mind *prima facie* a clear exemplification of trespass. D Trespass does not depend on the balancing of rights but on the right of a property owner to exclude trespassers. (see also *Anchor Brewhouse Developments Ltd and Ors v. Berkely House (Docklands Development) Ltd* [1987] 3 BLR 82.

E **[22]** A landowner is entitled to an injunction to restrain trespass onto his land whether or not the trespass harms him (see *Patel v. WH Smith (Eziot) Ltd and Or* [1987] 2 All ER 569 @ 573).

[23] A private person who applies for an injunction to restrain a F body from entering illegally on or interfering with his land is not required to make out a case of destructive trespass or irreparable damage. See *"A Treatise on the Law and Practice of Injunctions"* by William Williamson Kerr (Sixth Edition) relying on *Liverpool Corporation v. Chorky Waterworks Co* 2 De GM & G 852; *Marriott* G *v. East Grimstead Gas & Water Co* [1909] 1 Ch 70.

[24] The next question that arises is whether damages is an adequate remedy, ie, if I were not to grant the interim injunction then would damages be an adequate remedy to the plaintiff if he were to succeed at trial and likewise, if I were to grant the interim H injunction but subsequently the plaintiff were not to be succeed at trial then would, the damages that the plaintiff has undertaken to provide to the defendant be an adequate remedy. In *Terra Damansara v. Nandex Development Sdn Bhd* [2006] 8 CLJ 657 it I was held by Abdul Malik Ishak J that trespass to land is

actionable *per se* without any proof of damage and liability is strict. See also *Patel v. WH Smith (Eziot) Ltd* [1987] 2 All ER 570, *John Trenberth v. National Westminister Bank Ltd* [1980] 1 EGLR 102.

[25] In the light of the above it has become necessary for me to consider the balance of convenience. It is my decision that the balance of convenience favours the plaintiff. If the interlocutory injunction were not allowed the plaintiff would find an access road built upon his property which would cause severe nuisance to him. If the injunction were allowed it would merely cause financial loss to 1st and 2nd defendant. As such damages would not be an adequate remedy for the plaintiff but would be for the defendants. (see *Abdul Aziz Mohamed Ginan & Ors v. Datuk Bandar Kuala Lumpur* (*supra*).

[26] The 3rd defendant argues that in exercise of its statutory duties and functions it issued a notice dated 30 March 2012 pursuant to s. 83 of the Street, Drainage and Building Act 1974 ordering the plaintiffs to evacuate their bungalow demolish the brick wall and to build a temporary access road and that if the plaintiffs failed to comply the 3rd defendant that would enter into the premises and carry out the works. I have read and re-read s. 83 and *prima facie* s. 83(1) talks about:

> any building or anything affixed thereon is in a ruinous state likely to fall or is in any way dangerous to any person therein or foot passengers on the streets adjoining such building.

and it empowers the 3rd defendant to serve on the owner of such building notice requiring him either to repair such defects or demolish the building or anything affixed thereon.

[27] Section 83(g) empowers 3rd defendant to do any or all of the acts required by the notice if the owner fails to comply. However upon a plain reading of s. 83. I cannot accept the 3rd defendant's construction of s. 83 that it is empowered to build a road over the plaintiff's property.

[28] To reiterate, there is, to my mind no power given to 3rd defendant in regard to the construction of a temporary access road upon the plaintiffs land. See *R v. Somerset County Council, ex parte Fewings & Ors* [1995] 1 All ER 513 @ 524 that any action taken

by a public body must be justified by a positive law and the rule is necessary in order to protect the people from arbitrary interference by those set in power over them.

[29] I am also mindful of s. 97 of the Local Government Act 1976 which was relied upon by the 3rd defendant. It gives any local authority power to enter upon land for the purposes of this Act. Clearly this provision only contemplates entry upon the plaintiff's property ''for the purpose of making any survey or inspection as for the purpose executing any work authorised by this Act to be executed by it''. This provision as I read it has only specific and limited application. It does not give the local authority an unfettered and unchecked authorisation in all cases. Otherwise there would not be the need for the proviso thereto. Therefore to my mind, upon a plain reading of this provision, the 3rd defendant is neither empowered nor authorised to enter upon the plaintiff's property, tear down the outer wall and build a public road on the property especially so without the plaintiff's consent.

[30] The 3rd defendant seeks also to rely on s. 101(v) of the Local Government Act 1976 which gives the 3rd defendant power ''to do all things necessary for or conducive to the public safety, health and convenience''. But this power is to my mind to be exercised strictly in accordance with a positive law. It is not an enabling power by itself. I would hold that for the 3rd defendant to enter on to the plaintiffs' land and build a temporary access road it would have to be permitted to do so either by the plaintiff or by a specific provision in law. And such a provision either specifically or generally allowing the 3rd defendant to enter upon the plaintiff's land for the purpose of building a temporary access road has not been brought to my attention.

[31] As the saying goes ''An Englishman's home is his castle''. So to my mind is a Malaysian man's home. Article 13 reigns supreme at it reads that no person shall be deprived of property save in accordance with law and that no law shall provide for compulsory acquisition or use of property without adequate compensation.

[32] The 3rd defendant had referred this court to *Smith & Ors v. Inner London Education Authority* [1978] 1 All ER 411 @ 418, *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1982] 1 LNS 83, *Saw Seng Kee v. Director Of Lands & Mines, Penang & Ors; Teoh Han Che v. Director Of Lands & Mines, Penang & Ors* [1986] 1 LNS 77 wherein it was held that the court had to look at the balance of convenience more widely and take into account the public interest. Be that as it may, this court has to ensure, that in exercising and executing its statutory duties to the public, the 3rd defendant's action are not only justified but are also sanctioned by the very law that it seeks to rely on. The 3rd defendant has not shown to me any statutory provision upon which it can ground its justification for the acts taken in regard to the plaintiffs' property.

Conclusion

[33] I therefore am of the considered view for the above reasons that a *bona fide* serious issue having been found to exist, the balance of convenience is also found to be firmly tilted in favour of the plaintiffs. I rule in favour of the plaintiffs and grant an interim injunction in terms of lampiran 2 prayer 2(a) until the disposal of the hearing of the writ or further order of court. I also am minded to extend this interim injunction to include para. 8 of lampiran 26, prohibiting or restraining the defendants whether by themselves, their officers, servants, agents or any of them or otherwise howsoever from directing, instructing, facilitating and/or encouraging the residents of Elyssa Villas to enter and/or use any part of the property.

Order

[34] So ordered accordingly.